STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

THE GROSSE POINTE LAW FIRM, P.C.
a/k/a LAW OFFICE OF ALAN BROAD, P.C.,

Plaintiff,

vs. Case No. 2012-5249-CK

JAGUAR LAND ROVER NORTH AMERICA, LLC,
ROVER MOTORS OF FARMINGTON HILLS,
LLC d/b/a LAND ROVER FARMINGTON HILLS,
AND JAGUAR AND LAND ROVER OF MACOMB,
LLC d/b/a JAGUAR LAND ROVER OF LAKESIDE
AND ELDER AUTOMOTIVE GROUP,

Defendants.
_____/

OPINION AND ORDER

Defendants Rover Motors of Farmington Hills, LLC ("Rover Motors") and Land Rover of Macomb, LLC ("Rover Macomb")("collectively, Dealer Defendants") have filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). In addition, Defendant Jaguar Land Rover North America, LLC ("Rover North") has filed a separate motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Plaintiff has filed a response to both motions and requests that the motions be denied.

Factual and Procedural History

This matter arises out of the purchase of a 2006 Range Rover from Rover Motors. The vehicle purchased ("Subject Vehicle") was registered and titled under "The Law Offices of Alan H. Broad, P.C." The Subject Vehicle was manufactured by Rover North. The Subject Vehicle was purchased for $98,468.00.

Over the past seven years Plaintiff has brought the Subject Vehicle in for numerous service/repair issues. The issues included: two squeals from the rear of the vehicle, a loose passenger exterior mirror, low coolant lights, a check engine warning, an inoperative park sensor, a rattling sun roof (twice), failure to start, door speaker vibrations and rear cargo area rattles.

In November 2011, Plaintiff sent a letter to Rover North notifying it that the Subject Vehicle was allegedly defective and demanded a "final repair" and/or reimbursement of the costs associated with the repairs needed. In response, Rover North offered to repurchase the vehicle for an amount to be determined. After more correspondence, the offer to repurchase the Subject Vehicle dissolved.

On September 25, 2013, Plaintiff filed its first amended complaint in this matter asserting the following claims: Count I- Breach of Contract, Count II- Accord and Satisfaction, Count III- Common Law Rescission, Count IV- Motor Vehicle Service and Repair Act, Count V- Fraud and Intentional or Negligent Misrepresentation, Count VI- Breach of Express and Implied Warranties, Count VII- Revocation of Acceptance, Count VIII- Violation of the Michigan Lemon Law, and Count IX- Magnuson-Moss Warranty Act.

On August 18, 2014, the Defendants filed their instant motions for summary disposition. Plaintiff has since filed responses to the motions and requests that the motions be denied. On October 20, 2014, the Court held a hearing in connection with the motions and took the matters under advisement. The Court has reviewed the materials submitted by the parties, as well as the arguments advanced at the hearing, and is now prepared to render its decision.

Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C) (10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

A. Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7).

The Court will begin by addressing the portion of Defendants' motions made pursuant to MCR 2.116(C)(7). Specifically, Defendants contend that Counts VI, VIII and IX are time-barred by the applicable statute of limitations. The statute of limitations at issue is provided by MCL 440.2725, which states:

> (1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Under the statute, a cause of action alleging breach of warranty in a sales contract for the sale of goods accrues at the time of delivery. *Baker v DEC Intern*, 458 Mich 247, 251-252; 580 NW2d 894 (1998). In this case, it is undisputed that Plaintiff's complaint was filed more than four years after the Subject Vehicle was purchased. Accordingly, Plaintiff's claims are time-barred to the extent that they are based on Defendants' failure to provide a non-defective vehicle.

In its response, Plaintiff contends that its claims are not based on Defendants' failure to provide a non-defective vehicle; rather, Plaintiff asserts that its claims are based on Defendants' failure to repair the defects. In support of its position, Plaintiff cites to several out-of-state decisions in which courts recognized a separate repair and replace limited warranty that accrues at the time the repair is attempted, and restarts each time another failed attempt takes place. See *Allen v Anderson Windows, Inc*, 913 F Supp 2d (SD Ohio, 2012); *Cosman v Ford Motor*

Company, 85 Ill App 3d 250; 674 NE2d 61 (1996); *Long Island Lighting v IMO Industries*, 6 F 3d 876 (CA 2, 1993); *Monticello v Winnebago Industries, Inc.* 369 F Sup 1350 (ND Ga. 2005).

While this Court recognizes that other jurisdictions have expanded the time limitations for breach of warranty claims it is not persuaded, without some modicum of Michigan appellate support, to adopt the interpretations contained in the non-binding cases cited by Plaintiff. Consequently, the Court is convinced that Plaintiffs' counts VI, VIII and IX must be dismissed pursuant to the applicable 4 years statute of limitations.

B. Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and (10)

1) Count I- Breach of Contract

In their motions, Defendants contend that they are entitled to summary disposition of Plaintiff's breach of contract claims because Plaintiff has failed to establish that a contract between the parties exists. A valid contract requires "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

In its response, Plaintiff asserts that a contract to repurchase the vehicle was formed. On December 20, 2011, Defendant North sent Plaintiff a letter pursuant to which it offered to repurchase the Subject Vehicle, but requested that Plaintiff provide it with certain information in order to allow it to calculate the repurchase amount. (*See* Defendant North's Exhibit C2.) On January 3, 2012, Plaintiff sent Defendant North a letter providing the requested information. (Id. at C3.) On January 19, 2012, Defendant North sent Plaintiff another letter in which it provided a proposed repurchase amount and provided that the settlement was subject to Plaintiff's acceptance of the terms contained in the letter. (Id. at C4.) On January 20, 2012, Plaintiff sent another letter to Defendant North in which it stated that it did not accept the repurchase amount

provided in the January 19, 2012 letter due to its disagreement as to whether there should be a mileage offset. (Id. at C5.) The parties continued to exchange correspondence but were unable to resolve their disagreement. Despite not being able to resolve the disagreement Plaintiff now claims that a valid and binding contract was formed. This Court disagrees.

A settlement agreement is a contract governed by the rules of contract construction and interpretation. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Stanton v Dachille*, 186 Mich App 247, 256; 463 Nw2d 479 (1990). The price of performance is an essential term. *Zurcher v Herveat*, 238 Mich App 267, 282; 605 NW2d 329 (1999). In this case the parties were unable to agree on the repurchase price. While Plaintiff asserts that Defendant North's proposed price was based on a misinterpretation of the law, the fact remains that the parties failed to come to an agreement of an essential term, price. Consequently, the Court is convinced that a valid and enforceable contract was not formed in this matter. Accordingly, Defendants' motion for summary disposition of Plaintiff's breach of contract claim must be granted.

2) Count III- Accord and Satisfaction

Next, Defendants seek summary disposition of Plaintiff's accord and satisfaction claim. Accord and satisfaction is an affirmative defense that must be proven by the party asserting it. *Obremski v Dworzanin*, 322 Mich 285; 33 NW2d 796 (1948). The elements of an accord and satisfaction are (1) an offer to compromise, (2) acceptance of the offer, and (3) consideration. Plaintiff contends that the offer to compromise was the offer of repurchase and that it accepted the offer. However, as discussed above there was no contract formed as the result of the parties' negotiations regarding the proposed repurchase. Accordingly, Plaintiff's accord and satisfaction

claim must fail. Moreover, even if a contract had been formed Plaintiff has failed to provide any authority supporting its position that accord and satisfaction is an independent cause of action in Michigan. For these reasons, Defendants' motion for summary disposition of Plaintiff's accord and satisfaction claim must be granted.

3) Count III- Rescission

Count III purports to state a claim for rescission. However, rescission is not an independent cause of action and the party seeking rescission must establish an independent cause of action that supports the remedy of rescission. *Monroe Bank & Trust v Jessco Homes of Ohio, LLC* 652 F Supp 2d 834, 840 (ED Mich 2009.) While Plaintiff may be entitled to seek rescission as a remedy if it prevails on the merits of one or more its claims, it may not pursue rescission as an independent cause of action.

4) Count IV- Motor Vehicle Service and Repair Act

Defendants also contend that they are entitled to summary disposition of Plaintiff's claims under the Motor Vehicle Service and Repair Act ("MVSRA"). As a preliminary matter, Plaintiff has stipulated that its MVSRA claims do not apply to Defendant North.

The MVSRA provides: "A person subject to this act shall not engage or attempt to engage in a method, act, or practice which is unfair or deceptive. MCL 257.1307. Administrative Rule 32 of the rules governing the MVSRA provides that it is unfair or deceptive to:

> It is an unfair and deceptive practice to:
> (a) Charge for repairs that are in fact not performed.
> (b) Perform repairs which are in fact not necessary, except when a customer insists that a repair be performed in disregard to the facility's advice that it is unnecessary.
> (c) Represent, directly or indirectly, that repairs are necessary when in fact they are not.
> (d) Perform repairs not specifically authorized.

> (e) Fail to perform promised repairs within the period of time agreed, or within a reasonable time, unless circumstances beyond the control of the repair facility, of which the repair facility did not have reason to know at the time of consignment, prevent the timely performance of the repairs.
> (f) Represent, either directly or indirectly, that a replacement part used in the repair of a vehicle is new or of a particular manufacture when in fact it is used, rebuilt, reconditioned, deteriorated, or of a different manufacture, or otherwise fail to disclose in writing, prior to the commencement of repairs, the use of used, rebuilt, or reconditioned parts.
> (g) Replace a part with one that lacks merchantability or fitness, or represent that parts or components provided or repairs performed are of a particular standard or grade when in fact they are not.
> (h) Fail, subsequent to a diagnosis for which a charge is made, to disclose, at the customer's request, a diagnosed or suspected malfunction together with the recommended remedy and any test, analysis, or other procedure employed to determine the malfunction.

The only allegedly wrongful action that Plaintiff provides support for is its allegation that "[Dealer Defendants] hid the fact and the substance of the Technical Repair Bulletins from the vehicle owner throughout the multiple failures to repair the defects." In this matter, the evidence, at best, indicates that Defendants did not disclose the content of the bulletins. However, Plaintiff does not cite to a particular portion of the administrative rules that required Defendants to independently advise Plaintiff of the content of the Bulletins. Accordingly, the Court is convinced that Plaintiff has failed to establish that a genuine issue exists as to whether Defendants violated the MVSRA. Consequently, Defendants' motion for summary disposition of Plaintiff's MVSRA claims must be granted.

5) Count V-Fraud and Misrepresentation

The next portion of Defendants' motions deals with Plaintiff's fraud and misrepresentation claims. In their motion, Defendants contend that Plaintiff's claims arise out of the warranty contract/repairs and therefore fail pursuant to the economic loss doctrine. The economic loss doctrine provides that "[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone,

for he has suffered only 'economic' losses." *Neibarger v Universal Cooperatives, Inc.*, 439 Mich 512, 486 NW2d 612 (1992). However, claims based upon fraud in the inducement are exempt from the economic loss doctrine. *Huron Tool and Engineering Co., v Precision Consulting Services, Inc.*, 209 Mich App 365; 532 NW2d 541 (1995). In its response, Plaintiff contends that Defendants' representative made materially misleading statements that the Subject Vehicle had been repaired, which induced it into delaying filing the litigation and to continuing to drive a dangerous vehicle. However, the only evidence that Plaintiff has provided in support of its argument is its principal, Alan Broad's, testimony that he believed that he was not told the truth. However, Mr. Broad's belief, without any evidence supporting that belief, is insufficient to create a genuine issue at to whether Defendants willfully or negligently made material representations. Consequently, Plaintiff's position is not properly supported and Defendants are entitled to summary disposition of Plaintiff's fraud and misrepresentation claims.

6) Count VI- Breach of Express and Implied Warranties

Count VI of Plaintiff's First Amended Complaint purports to state a claim for breach of express and implied warranties. It appears undisputed that Rover North provided a bumper-to-bumper warranty for the Subject Vehicle for 4 years, or 50,000 miles (whichever happened first). In its motion, Defendant North contends that Plaintiff first presented the Subject Vehicle for water related damage "on November 28, 2008 with 44,159 miles, after the expiration of the vehicle's bumper-to-bumper warranty." In this case, it is undisputed that the Subject Vehicle was purchased on December 30, 2005. Accordingly, on November 28, 2008 the Subject Vehicle was still within the 4 year warranty period and had less than 50,000 miles. Consequently, the Subject Vehicle was still covered by the bumper-to-bumper warranty. Further, Plaintiff has presented evidence the post-warranty repairs were necessitated by the covered repairs. For these

reasons, Defendant North's motion for summary disposition of Plaintiff's breach of warranty claims must be denied.

With respect to the Dealer Defendants, it appears undisputed that neither defendant provided a warranty covering the Subject Vehicle or repairs. Consequently, their motion for summary disposition of Plaintiff's warranty claims must be granted.

6) Count VII- Revocation

In its motion, Rover North contends that Plaintiff's revocation of acceptance claim against it fails because there is no privity of contract between it and Plaintiff. The Michigan Court of Appeals, in *Henderson v Chrysler Corp*, 191 Mich App 337; 447 NW2d 505 (1991) held:

> Revocation of acceptance under UCC § 2-608, MCL 440.2608; MSA. § 19.2608, is typically utilized against an immediate seller. This section allows a buyer to revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him. There is nothing to indicate that the Legislature intended the revocation of acceptance of a contract to apply to parties not in privity of contract. Acceptance under the UCC concerns the relationship between a buyer and a seller, M.C.L. § 440.2606; M.S.A. § 19.2606. Thus, revocation is inextricably connected to the contractual relationship between a buyer and a seller. This rationale includes the concept of contractual privity between the parties. On the basis of this statute's language and clear implication, we follow the opinions of a majority of other courts that have held that the remedy of revocation of acceptance is not available against a manufacturer. (internal citations omitted)

Id. at 341-342.

Based on the holding and reasoning of *Henderson*, the Court is satisfied that Plaintiff may not maintain a revocation of acceptance claim against Rover North.

With regard to the Dealer Defendants' motion, they contend that Plaintiff's revocation of acceptance claims against them fail because they disclaimed all warranties. In this case, it appears undisputed that the Dealer Defendants disclaimed all warranties. In *Davis v LaFontaine*

Motors, Inc, 271 Mich App 68; 719 NW2d 890 (2006) the Michigan Court of Appeals addressed whether revocation is available against a seller that disclaimed all warranties. Specifically, the Court held:

> [F]or the purposes of revocation under MCL 440.2608, nonconformity is a failure of the goods sold to conform to legitimate expectations arising from the contract. In this contract, it was plainly agreed that "All goods, services and Vehicles sold by Dealer are sold 'AS IS' unless Dealer furnished Buyer with a separate written warranty or service contract or the used car sticker on the window on the vehicle indicates otherwise." Because plaintiffs purchased the vehicle "as is," the vehicle, even with the alleged defects, conforms to the contract and therefore necessarily conforms to the parties' legitimate contractual expectations. Plaintiffs got the vehicle for which they bargained; there was no nonconformity.
>
> *Id.* at 82.

In this case, the Dealer Defendants did not warrant that the Subject Vehicle was free from defects and affirmatively disclaimed all warranties. Accordingly, as in *Davis*, the Subject Vehicle conforms to the parties' contractual expectations. Consequently, Plaintiff's claim for revocation must fail.

7) Count VIII- Violation of Michigan Lemon Law

To be entitled to relief under the Warranties on New Motor Vehicle Act ("Lemon Law"), the defect at issue must have been reported to the manufacturer or dealer no later than one year from the delivery date of the vehicle to the original consumer (MCL 257.1402), and the plaintiff must show either that the same defect was repaired by the manufacturer or dealer at least four times within two years of the date of the first attempt to repair, or that the vehicle was out of service for 30 days or more during the term of the manufacturer's express warranty, or within one year from the date of delivery to the original purchaser, whichever is earlier (MCL 257.1403(5).

In this case, the Subject Vehicle was first submitted for repairs on December 26, 2006. The Subject Vehicle was not presented for repairs for a second time until April 6, 2009, over 2 years after the Subject Vehicle was first submitted for repairs. In addition, the Subject Vehicle was not out of service for more than 30 days within the first year that Plaintiff owned it. Consequently, the requirements provided by MCL 257.1403(5)(a) and (b) are not satisfied in this matter and Plaintiff's claims under the Lemon Law fail as a matter of law.

8) Count IX- Magnusson-Moss Warranty Act

Rover North also contends that Plaintiff's Magnusson-Moss Act claims fail because the underlying warranty claims fail. However, for the reasons discussed above, Defendant North's motion for summary disposition of Plaintiff's warranty claims is denied. Accordingly, Rover North's motion for summary disposition of Plaintiff's Magnusson-Moss Warranty Act claims also must be denied.

9) Spoliation of Evidence

Defendants also contend that Plaintiff's claims should be dismissed based on Plaintiff's alleged spoliation of evidence. Specifically, Defendants contend that Plaintiff spoiled evidence by selling the Subject Vehicle one day prior to filing this matter.

"Spoliation [of the evidence] refers to destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. Gen. Motors Corp.,* 271 F3d 583, 590 (4th Cir 2011). A party has "a duty to preserve evidence" "[e]ven when an action has not been commenced and there is only a potential for litigation." *Brenner v Kolk, 226* Mich App 149, 162; 573 NW2d 65 (1997). This duty to preserve evidence includes all evidence "that [a party] knows or reasonably should know is relevant to the [anticipated] action." *Id.*

In this matter, Plaintiff had possession of the Subject Vehicle up until the day before it filed its complaint in this matter. Thus, plaintiff failed to preserve relevant evidence before notifying Defendants of its claims, and consequently Defendants had no opportunity to inspect the vehicle. While Plaintiff contends that Defendants have the parts that were replaced and that they inspected the vehicle in January 2012, the inspection was not conducted in preparation for, or with knowledge of, the instant litigation, and having the parts alone hinders Defendants ability to prepare their defense. For these reasons, the Court is satisfied that Plaintiff should have preserved the Subject Vehicle in anticipation of its suit. Consequently, sanctions, in the form of an adverse inference are appropriate. *Brenner,* 226 Mich App at 164.

Conclusion

For the reasons set forth above, Defendants Rover Motors of Farmington Hills, LLC and Land Rover of Macomb, LLC's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) is GRANTED. In addition, Defendant Jaguar Land Rover North America, LLC's motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10) is GRANTED, IN PART, and DENIED IN PART. Specifically, Defendant Jaguar Land Rover North America, LLC's motion for summary disposition of Plaintiff's breach of warranty and Magnusson-Moss Warranty Act claims is DENIED. Defendant Jaguar Land Rover North America, LLC's motion is granted with respect to Plaintiff's remaining claims. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: November 6, 2014

JCF/sr

Cc: *via e-mail only*
Lawrence M. Scott, Attorney at Law, lscott@orlaw.com
Scott M. Erskine, Attorney at Law, serskine@erskinelawgroup.com